

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JANINE L. HURLBURT**

Claimant

VS.

**T-MOBILE USA, INC.**

Respondent

AND

**TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA**

Insurance Carrier

Docket No. 1,021,535

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the February 25, 2009, Order entered by Administrative Law Judge Thomas Klein. W. Walter Craig, of Derby, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that respondent paid claimant more benefits than provided for in the eventual final award and concluded "there is no rational basis for the Court to order penalties for failing to overpay the Claimant by an even larger margin."<sup>1</sup> Accordingly, the ALJ denied claimant's request for penalties.

**ISSUES**

Claimant requests review of the ALJ's order denying penalties, arguing that respondent should have been required to continue paying benefits for the period after the Court of Appeals issued its decision remanding the case to the Board on July 18, 2008, until the Board issued its opinion on remand on December 31, 2008, because the award was not final until that date.

---

<sup>1</sup> ALJ Order (Feb. 25, 2009) at 1.

Respondent asserts that pursuant to K.S.A. 2008 Supp. 44-556(b), it was only required to pay compensation benefits until the "decision of the court of appeals on review" was issued on July 18, 2008. Respondent argues the statute does not require it to continue payment of compensation during the period of time after the decision of the Court of Appeals until the mandate when the Kansas Supreme Court denied review on November 4, 2008. Respondent also contends that the decision of the Court of Appeals became final on November 4, 2008, and that is the last date any compensation would have been due under any theory, as that was the date the Award became final. Accordingly, respondent contends it was not required to continue payment of compensation after that date until the date of the order of the Board on remand, December 31, 2008. Respondent, however, contends that the above issues are moot, as claimant was paid in full all compensation ordered by the Board in its original order of November 21, 2006, as of March 2, 2008. Respondent states that it continued payment of compensation from March 2, 2008, until July 18, 2008, in error, and claimant has received compensation for two months after it should have stopped. Therefore, respondent argues that claimant is not entitled to penalties, as all compensation due under the Board's Order of November 21, 2006, was paid in full.

The issues for the Board's review are:

1. Was the original award in this case paid in full by respondent before the decision of the Court of Appeals was issued on July 18, 2008?
2. If not, what is the meaning of the term "decision of the court of appeals" as used in K.S.A. 2008 Supp. 44-556(b)?

#### **FINDINGS OF FACT**

The original Award in this matter was entered on June 20, 2006. This Award was appealed to the Board for review. On November 21, 2006, the Board modified the original Award and found that claimant was entitled to an award of permanent partial disability compensation based upon a 37 percent general bodily disability for a total award of \$59,224.60. The Board's Order was appealed to the Court of Appeals, and on July 18, 2008, the Court of Appeals reversed the Board's order based on *Casco*,<sup>2</sup> and remanded the matter to the Board to recalculate claimant's benefits. Claimant requested review of the Court of Appeals' decision by the Kansas Supreme Court, and review was denied on November 4, 2008. The Board issued its Order upon remand on December 31, 2008, recalculating claimant's benefits based on two scheduled injuries rather than an injury to the body as a whole. The Board found that claimant had a 7.65 percent impairment to the right upper extremity at the level of the forearm and a 7.65 percent impairment to the left upper extremity at the level of the forearm. This computed to an award of \$7,793.45 to each arm, or a total of \$15,586.90.

---

<sup>2</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

Based on K.S.A. 2008 Supp. 44-556(b), respondent stopped payment of disability compensation on July 16, 2008, two days before the Court of Appeals' decision was entered on July 18, 2008. Claimant is requesting payment of compensation from July 18, 2008, until December 31, 2008, as well as assessment of civil penalties of \$100 per week pursuant to K.S.A. 44-512a.

In its brief, respondent contends it has paid claimant 14.85 weeks of temporary total disability benefits or \$5,222.60, and permanent partial disability benefits for a period of 96.28 weeks, or \$33,860.71, a total of \$39,083.31. It contends that the Board's Order of November 21, 2006, ordered it to pay claimant the amount of \$33,860.72 in temporary total disability benefits and permanent partial general disability compensation as of November 13, 2006, and that the remaining balance of the award, \$25,363.88, was to be paid at the rate of \$351.69 per week until paid or until further order of the Director. This would have required respondent to pay claimant \$351.69 per week for 72.12 weeks, or until March 2, 2008. Respondent, in its brief, contends it paid claimant through March 2, 2008, paying off the award, and then continued payments, in error, until July 16, 2008.

#### **PRINCIPLES OF LAW**

K.S.A. 44-512a(a) states:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due . . . if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

K.S.A. 2008 Supp. 44-556(b) states:

Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

#### **ANALYSIS**

The Board's November 21, 2006, Order awarded claimant disability compensation totaling \$59,224.30. That Order provided that as of November 13, 2006, \$33,860.72 was past due and \$25,363.88 was payable at the rate of \$351.69 per week. All but 10 weeks

of the past due amount was stayed by the commencement of an action for review by the Court of Appeals. Therefore, the most respondent was liable to pay during the pendency of the appeal was \$25,363.88, plus the additional ten weeks of compensation, or \$3,516.90, for a total of \$28,880.78. Respondent paid that amount in full by April 2, 2008. Respondent continued making payments until July 16, 2008. Respondent was not obligated to make any payments after April 2, 2008.

#### **CONCLUSION**

The past due portion of the original award was stayed by the appeal. Respondent paid all of the award that was not stayed and, therefore, no compensation was not paid when due within the meaning of the penalty statute, K.S.A. 44-512a. The Board need not reach the issue of what is mean by the "decision of the court of appeals" as used in K.S.A. 2008 Supp. 44-556(b).

#### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Thomas Klein dated February 25, 2009, is affirmed but for the reasons stated above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2009.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant  
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge